U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Tenth Congress

January 10, 2007

The Honorable Thomas O. Barnett
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable Deborah Platt Majoras
Chairman
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

Dear Assistant Attorney General Barnett and Chairman Majoras:

I am writing to request the Department's and Commission's views on an important issue before the Supreme Court involving vertical minimum price fixing. The Supreme Court has accepted certiorari in *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 28 (2006), a case that requires the Court to examine whether to overturn a venerable line of cases that treat such price fixing as per se unlawful.

As you know, vertical minimum price fixing, often called resale price maintenance (RPM), is an issue of vital importance to consumers and retailers, as well as many manufacturers. Congress has legislated on this issue on at least four occasions over the past 70 years: in 1937 to pass the Miller Tydings Act, in 1952 to pass the McGuire Act, in 1975 to pass the Consumer Goods Pricing Act, and in 1983 to prohibit the expenditure of appropriated funds to urge the Supreme Court to overturn the per se rule.

As many members of Congress remain vitally interested in this topic, please provide answers to the following questions:

1) Will the Department of Justice and/or the Federal Trade Commission file a brief in the *Leegin* case? If so, please advise of the date and nature of such filing.

2) Given Congress' active involvement in the RPM issue–on the last two occasions (in 1975 and in 1983) in unequivocal support of the *Dr. Miles* line of cases– would you agree that the Supreme Court should defer to Congress on this issue?

3) If the Department and/or Commission plan to file a brief in this case, would you agree to consult with the relevant committees of the Congress in advance of any filing?

4) The Department of Justice and the Federal Trade Commission testified in favor of the 1975 Consumer Goods Pricing Act. Both agencies testified that the per se rule prohibiting RPM protects competition and consumers. Please provide your comments on that testimony, indicating areas of agreement or disagreement.

5) In a relatively recent enforcement initiative, the Federal Trade Commission acted against the sound recording industry's use of minimum advertised prices for the sale of CDs. In that case, the FTC estimated that the restricted resale prices cost consumers $480 million over a three year period. *See* Record Companies Settle FTC Charges of Restraining Competition in CD Music Market, FTC Press Release, *available at* <www.ftc.gov/opa/2000/05/cdpres.htm>. Would you agree that RPM or minimum advertised pricing can be particularly harmful to consumers in cases such as this where there is little interbrand competition?

6) One of the issues before the Supreme Court is whether there are meaningful distinctions between RPM (currently subject to the per se rule) and non-price vertical restraints (subject to the rule of reason). Commenting on this topic, Professor Warren Grimes, in a briefing paper supplied to the Committee, has written:

> Most non-price vertical restraints are used to restrict distribution. RPM, in contrast, can be and often is used with unrestricted distribution. Because of this distinction, RPM is potentially far more threatening to efficient retailing and consumer prices. A manufacturer limiting distribution through location clauses or exclusive distribution practices does not seek a restraint on all retailers. Although the impact of a non-price vertical restraint on intrabrand retail competition can be severe, the restraint itself is self-limiting because the manufacturer, once achieving brand prominence, will want to open its distribution system to maximize sales. RPM is the only widely practiced vertical restraint that threatens the broad cross-section of multi-brand retailers that sell a variety of brands. Thus, among widely employed vertical restraints, RPM is the most threatening to innovative and efficient retailing and to the consumer interest in shopping for the lowest price.

Would you agree or disagree with this explanation? Please explain.

Thank you for your consideration. Please provide responses by January 22, 2007. If you need assistance, feel free to contact Stacey Dansky, counsel to the House Judiciary Committee, at 202-225-3951.

Sincerely,

cc: James Clinger
Acting Assistant Attorney General
Office of Legislative Affairs
US Department of Justice

Jeanne Bumpus, Director
Office of Congressional Relations
Federal Trade Office